FILE COPY

DEC 27 1933

BATON ROUGE, LOUISIANA

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1933.

No. 355

TRINITYFARM CONSTRUCTION COMPANY,
Appellant,

versus

ALICE LEE GROSJEAN, SUPERVISOR OF PUBLIC ACCOUNTS OF LOUISIANA,
Appellee.

Appeal from the United States District Court for the Eastern District of Louisiana.

BRIEF OF DEFENDANT-APPELLEE.

GASTON L. PORTERIE,
Attorney General of Louisiana;

PEYTON R. SANDOZ,
Special Assistant Attorney General of Louisiana;

JUSTIN C. DASPIT,
Special Assistant Attorney General of Louisiana;

Counsel for Defendant-Appellee.

Montgomery-Andree Printing Co., Inc., 430-32 Chartres, N. O. La.

SUBJECT INDEX.

	Page
Summary of Argument	1
Argument	2-28
Appellant's Points Nos. 1, 2 and 3	2
Appellant's Point No. 4	26
Conclusion	28

TABLE OF CASES CITED.

Ackerlind v. United States, 240 U. S. 531	15
Alward v. Johnson, 282 U. S. 509	15, 16
Baltimore Shipbuilding & Dry Dock Co. v. Baltimore, 195 U. S. 375	9, 15, 16
Burnet v. Coronado Oil Co., 285 U. S. 393	25, 26
Casement v. Brown, 148 U. S. 615	20
Central Pacific R. R. v. People of California, 162 U. S. 91	9, 13, 15
Choctaw, O. G. R. R. Co. v. Mackey, 256 U. S. 531	15
Eastern Air Transport, Inc., v. South Carolina Tax Commission, 285 U. S. 147	24
Edleman v. Boeing Air Transport Inc., 289 U. S. 249	24
Gillespie v. State of Oklahoma, 257 U. S. 501	3, 25
Gregg Dyeing Co. v. Query, 286 U. S. 472	24
Gromer v. Standard Dredging Co., 224 U. S. 362	15, 16
Group No. 1 Oil Corporation v. Bass, 283 U. S. 279	15, 25
Helson v. Commonwealth of Kentucky, 279 U. S. 245	22, 23, 24
M'Culloch v. Maryland, 4 Wheat. 316	15
Metcalf & Eddy v. Mitchell, 269 U. S. 514	11, 12, 13, 14
Nashville, Etc., R. R. v. Wallace, 288 U. S. 249	24
National Bank of Louisville v. Commonwealth of Kentucky, 9 Wall. 353, 19 L. Ed. 701	9
Osborne v. Bank of United States, 9 Wheat. 738	15
Panhandle Oil Co. v. Mississippi, 277 U. S. 218	3, 25
Susquehannah Power Company v. State Tax Commission, 283 U. S. 291	14
Thomson v. Union Pacific R. R. Co., 9 Wall. 579	9, 15, 17
Union Pacific R. R. Co. v. Peniston, 18 Wall. 5	15
Willcuts v. Bunn, 282 U. S. 216	13

TABLE OF STATUTES CITED.

Section 2, Act 6 (E. S.) of the Legislature of Louisiana of 1928	27
Section 14, Act 6 (E. S.) of the Legislature of Louisiana of 1928	3, 26
Section 2, Act 1 (E. S.) of the Legislature of Louisiana of 1930	27
Section 14, Act 1 (E. S.) of the Legislature of Louisiana of 1930	3, 26

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1933.

No. 355

TRINITYFARM CONSTRUCTION COMPANY,
Appellant,

versus

ALICE LEE GROSJEAN, SUPERVISOR OF PUBLIC ACCOUNTS OF LOUISIANA,
Appellee.

Appeal from the United States District Court for the Eastern District of Louisiana.

BRIEF OF DEFENDANT-APPELLEE.

SUMMARY OF ARGUMENT.

The appellant has reduced to four salient propositions the various grounds of objection leveled at the judgment of the District Court herein, as outlined in the thirteen specific paragraphs set forth in its assignment of errors. The four propositions now apparently relied upon are set forth at page ten of appellant's brief, as follows:

Point 1. "The contracts existing between the United States and appellant for the construc-

tion of levees on the main stem of the Mississippi, are means adopted by the Federal Government for carrying out its delegated powers."

Point 2. "The statutes complained of impose a direct burden upon the contracts existing between the United States and appellant."

Point 3. "The State is without power to impose the tax."

Point 4. "Appellant is without adequate remedy at law."

As we conceive it, appellant corporation's points two and three are but corollaries of point one, and might have been epitomized in the one general contention that appellant corporation is an agent or instrumentality of the Government and for this reason is immune from State taxation. We shall accordingly argue these three points as one, and from the angle noted.

We will treat of separately in this brief appellant's point four, wherein it contends that it is without adequate remedy at law.

ARGUMENT.

Appellant's Points 1, 2 and 3.

We are free to concede that if appellant, by any rational process of reasoning, can establish legal justification for its claim that it is an agency or instrumentality of the Federal Government its fight is won, and it need not have burdened this Court with consideration of any other issue.

The concession which we make is not predicated, however, upon any particular argument of the appellant, nor upon any of the authorities cited by it, but upon the plain language of Section 14 of Act 6 of the Extra Session of the Legislature of Louisiana of 1928, as amended, and upon Section 14 of the Amendment to the Constitution of Louisiana, as proposed by Act 1, (E. S.) of 1930.

Section 14 of each provides, as follows:

> "Section 14. The tax herein levied shall not apply to sales to the United States Government or any agency or department thereof, and when such tax is paid by the said United States Government or any agency or department thereof it shall be refunded by the Supervisor of Public Accounts upon proper showing and authentic proof thereof, and shall be paid from the funds in the hands of the said Supervisor of Public Accounts which have been collected * * * and which have not been paid by the said Supervisor of Public Accounts to the State Treasurer as provided herein." *Id.*

There is no need then, for appellant to bolster up its claim by citation of *Gillespie v. Oklahoma, 257 U. S. 501; Panhandle Oil Company v. Mississippi, 277 U. S. 218,* nor any other case dealing with the rights, immunities and exemptions of actual agencies or instrumentalities of the Federal Government. The statute and Constitutional Amendment of Louisiana herein involved accord to plaintiff corporation full exemption and immunity from the taxation in question,—if it is qualified to avail itself of those provisions.

The sole basis for appellant's claim that it is an agency or instrumentality of the Federal Government is

that it holds contracts to construct certain levees for the United States along the main stem of the Mississippi River, in Louisiana.

From this premise it argues to the conclusion that Louisiana's excise taxes on the privilege of using, consuming and selling gasoline in the State constitute the laying of a direct burden upon the performance by the Federal Government of one of its delegated powers.

This burden, so appellant solemnly asserts, arises from the fact that the cumulative five cents per gallon excise tax added to the cost of gasoline used and utilized by it in the performance of its contracts with the Government makes the Government pay more for its levees because the added cost of the tax will enter into the computation of every intelligent bidder and become a part of the cost of the work to the Government.

We accentuate the fact that appellant's contention is that *in future contracts* for levee construction, if the gasoline tax is taken into consideration by the bidder, the cost of the work to the Government will be increased by just that much, thereby imposing a direct burden upon the performance by the Federal Government of one of its delegated powers.

The Court will note that appellant corporation not only does not assert that its *present contracts* with the Government are so burdened, but that it actually introduced proof in the trial Court to the effect that in computing its bids for the work in question it *did not* include in the cost thereof the gasoline tax which is the subject matter of this controversy.

At pages *40, 41 and 42 of the Record* will be found the affidavit of J. D. Kirven, Vice-President, Director and General Manager of appellant corporation, wherein he recites specifically that while the *purchase price* of the gasoline was calculated in compiling the cost for bids for the work in question, there was not included in the computation *"any sum whatever to cover the excise taxes claimed by the State of Louisiana for the privilege of using such gasoline in the performance of such work." (R. 41, 42).*

To raise the question of the possible *future* effect of the imposition of such taxes upon similar contracts which may *hereafter* be entered into by appellant, or others, with the Government, is to raise a question which is moot, and Courts do not ever assume to determine purely speculative propositions.

Appellant's solemn averment and proof of its failure to include the amount of the excise taxes referred to in its *present bids and contracts* with the Federal Government effectively close the door to any complaint it may at this time make on the score that its contracts with the Government are burdened by the aforesaid taxes because *they are admittedly not so burdened.* Surely this Court cannot, in reason, be asked to supply in advance relief from a contingency which has not only *not occurred*, but which may *never* happen.

If appellant's present contracts are not weighted by the taxes in controversy,—since they were not figured into the cost of the work to the Government,—wherein lies the burden upon appellant's contracts with the Government, and wherein lies the interference by the State of Louisiana

with the Federal Government in carrying out its delegated powers?

Appellant corporation, before it entered into its contracts with the Government, surely knew, or was presumed to know, that the State of Louisiana, by statute, provided for the imposition of the so-called gasoline taxes. No one may plead ignorance of the law, and yet in the face of this knowledge, in entering into its contracts with the Government it admittedly failed to compute the aforesaid excise taxes in its aforesaid bids, as an item of expense comprising a part of the basic cost of the work.

Appellant having failed to exercise a right which prudent and intelligent bidders are presumed to exercise, and having displayed a lack of vigilance by failure to protect its own interests, it suddenly awakens from its slumber and now seeks to retrieve its error at the expense of the State of Louisiana, which, if permitted to do, would be tantamount to penalizing said State for appellant's laches, and would enable it to profit from its own neglect and lack of foresight at the expense of the State of Louisiana without any material advantage to the Federal Government, in whose behalf appellant now so vociferously clamors on the pretext of removing a burden from the Government's exercise of delegated powers.

We submit that if there is anything which equity abhors, and appellant corporation is invoking the gracious ear of equity, it is the somnolent individual who through his own fault brings harm upon himself, since it is a cardinal restrictive maxim of equity "that equity aids the vigilant, not those who slumber on their rights."

The appellee makes this specific defense in her answer herein as set forth in *paragraph 25* thereof, and which may be found *at pages 21 and 22 of the Record.*

Necessarily, one engaged in performing work for the Government under contract, or otherwise, is to some extent an instrumentality of the Government, but it does not follow that because one uses his private property for the purpose of deriving individual profit from his dealings with the Federal Government he may screen his property from State taxation by invoking the rule that neither the Federal Government nor the State Government can tax instrumentalities the one of the other.

Of course, we understand that the immunity which appellant seeks is against the powers delegated to the State of Louisiana by its Constitution and the statute herein involved to lay a tax upon the use of gasoline—which it is pleased to call a part of its equipment—devoted exclusively to the performance of its contracts with the Federal Government, an immunity which, appellant contends, is "essential to the continued use by the Federal Government of means which it has adopted from the beginning to carry out its delegated powers".

It is to our minds a far-fetched and visionary presumption to assert that one who effects an individual and transitory alliance with the Government becomes, even as to that transaction, a governmental agency or instrumentality in the sense that it may claim all tax immunity and exemptions which accrue to the Government in its sovereign capacity.

It is difficult to conceive of a private corporation, *operating exclusively for private gain*, and with absolutely no relation to the Government except that which arises from a purely ephemeral business contract, for the execution of its part of which it will obtain full and ample remuneration, to be allowed by any Court to masquerade as a governmental agency or instrumentality *for no other purpose in the world than to escape payment of its proportionate share of legitimate taxation.*

Surely, if the Government considered appellant corporation to be one of its agencies or instrumentalities, *or intended to make it such by virtue of its contracts with appellant*, it would not have bound appellant to the obligation of obtaining, at its own expense, all required licenses and permits when, as a governmental agency or instrumentality, it could not be legally required by any State or municipality to procure such licenses or permits.

We point out that under the terms of the contracts in question appellant corporation is obligated, without additional expense to the Government, to obtain all required licenses or permits which may be required of it, and therein, as a matter of fact, lies the secret of the failure of appellant corporation to add to the cost of its work the amount of gasoline taxes which it knew it would be required under the laws of Louisiana to pay. *(See Admissions, paragraph 26, R. p. 27; see further, contract, Article 10, R. pp. 34-35).*

We believe it is amply demonstrated that appellant's business relation with the United States Government is not that of a servant, agent, or instrumentality, but purely

and simply that of an independent contractor, in which latter capacity appellant may not merit, nor claim, immunity from any form of taxation under guise of being a governmental agency or instrumentality.

But even if appellant corporation were entitled to the classification of an agent or instrumentality of the Government, it still does not follow that appellant may claim exemption from taxation on that ground merely because it holds contracts with the Government to do certain work which the Government, in its sovereign capacity, elects to have done.

A private corporation cannot claim exemption from taxation merely because it is transitorily or temporarily engaged in the service of the United States, regardless of the character of such service. *Louisville Bank v. Kentucky, 9 Wall. 353, 19 L. Ed. 701; Baltimore Shipbuilding Co. v. Baltimore, 195 U. S. 375.*

State taxation of the instruments or agencies of Government is not objectionable on this ground if it does not impair their usefulness or efficiency, or hinder them from serving the Government as they were intended to serve it. *Central Pac. R. R. Co. v. People, 162 U. S. 91; Thompson v. Union Pac. R. R. Co., 9 Wall. 579.*

Appellant corporation does not pretend that its usefulness or efficiency has in any manner been impaired, or will in any manner be impaired, by the imposition of the taxes in controversy; nor does it contend that the payment of these taxes hinders it even to the slightest degree from serving the Government as it was intended to serve it.

Also, the tax not having been actually computed in the price of its bids there is no burden upon the Government or upon its contracts with appellant, nor is the Government one jot or tittle impeded in the exercise of its delegated powers by this tax, since the Government not only absolved itself by the terms of its contracts from the payment of all licenses or permits which may be required of the appellant, but the latter admits that it did not seek to impose this burden upon the Government, or to pass the burden on to the Government, if burden there was, by adding the amount of the tax to the cost price of the work contracted for.

How, then, can the imposition of a tax on the distribution, handling and use of gasoline which is not objectionable in amount, impair appellant's usefulness or efficiency, or hinder it from serving the Government as it should, when it has not computed the tax in the cost of its work, and especially when it is under no obligation to the Government to employ the type of machinery in its work requiring the use of gasoline to operate?

Appellant might have selected, as indeed it was free to do at its own will, the Diesel or other type of crude oil burning machinery, in which event it would have had to pay no taxes of the kind sought to be imposed by the State of Louisiana, since no excise tax is imposed by the State upon the privilege of handling, distributing, using or consuming crude oil in the State.

The Court will bear in mind that the Government, obviously for the purpose of satisfying itself of the physical capacity or ability of appellant to efficiently execute the

work it was bidding for, at the time of submission of bids required appellant to furnish a list of the machinery it proposed to use on such work in the event the same should be awarded to it, *(Admissions par. 19, R. 26)*, but the Government did not undertake to *dictate* to appellant what particular makes, brands, or types of machinery or equipment appellant should use. *(Admissions par. 16, R. 25)*.

Thus, it is plainly established that if the imposition of the excise taxes sought to be levied by the State at all hinders appellant in serving the Government under its contracts, it is because appellant, of its own volition, and not by reason of any obligation (or even necessity so far as the proof shows), chose to equip itself with a certain type of machinery requiring gasoline to operate.

We have said that because appellant holds contracts with the Federal Government to build levees in Louisiana it does not follow that appellant thereby becomes in legal contemplation an agency or instrumentality of the Government and hence entitled to the immunities which ordinarily accrue to such agencies and instrumentalities. This Honorable Court has so specifically held.

In *Metcalf & Eddy v. Mitchell, 269 U. S. 514*, this Court said:

> "Not every person who uses his property or derives a profit in his dealings with the Government may clothe himself with immunity to taxation on the theory that either he or his property is an instrumentality of the Government within the rule that neither the Federal nor the State Government can tax instrumentalities the one of the other." *Id.*

In the cited case the question of the taxability of Governmental agencies, both State and Federal, was discussed at length, and this Honorable Court pointed out therein that it was not possible to state in terms of general application just what instrumentalities of either a State or the Federal Government are exempt from taxation by the other.

This Honorable Court, in the case referred to, while declining to attempt to lay down a hard and fast rule on the subject, did specifically hold that one who is not an officer or employee of a State, (or of the United States), does not establish exemption from taxes merely by showing that his income was received as compensation for services rendered *under a contract* with the State (or nation).

Here this Honorable Court made a clear distinction between claims for exemption from taxation by persons who are officers or employees of the Government (State or Federal), and persons who claim the exemption merely because they hold contracts to perform certain governmental work.

In the one case the officer or employee was held to be a governmental agent or instrumentality, and as such immune from State or Federal taxation; in the other, as contractor, an exemption from taxation was held to be inapplicable since the contractor "is neither an officer nor an employee of government, and whose only relation to it is that of contract, under which there is an obligation to furnish service, for practical purposes not unlike a contract to sell and deliver a commodity."

Metcalf & Eddy v. Mitchell, supra, p. 524.

In the cited case this Court said that while it would not be understood as laying down any rule that taxation might not affect agencies of this character in such a manner as directly to interfere with the functions of government and thus be held void, it made it clear that one claiming exemption from taxation necessarily had to occupy the position or attitude of an officer or employee of the Government in order for the immunity to attach.

In the cited case, *at page 526*, this Court said:

> "But we do decide that one who is not an officer or employee of the State does not establish exemption from Federal income taxes merely by showing that his income was received as compensation for services rendered under a contract with the State; and when we take the next step to a complete disposition of the question, and inquire into the effect of the particular tax, on the functioning of the state government, we do not find that it impairs in any substantial manner the ability of plaintiffs in error to discharge their obligation to the State or the ability of a State or its sub-divisions to procure the services of private individuals to aid them in their undertakings." *Central Pac. R. R. Co. v. California, 162 U. S. 91. Id.* See, also, *Willcutts v. Bunn, 282 U. S. 216.*

The principle of the ruling here laid down is thoroughly applicable to appellant who is in no sense an employee or officer of the Federal Government, and whose income or remuneration is derived exclusively as compensation for services rendered under *contracts* with the Government, and whose ability to discharge its obligations to the Government is not in the slightest manner impaired or hindered because of the requirement by the State of Louisi-

ana that appellant pay the same taxes on gasoline that *all other persons* who sell, use or consume the commodity in the State are required to pay.

In *Susquehannah Power Company v. Tax Commission, 283 U. S. 291*, this Court declared that "exemption of government instrumentalities from taxation by another government must be given practical construction not unduly impairing the taxing power of one government or the appropriate exercise of functions by the other".

In that case it was contended that because the Susquehannah Power Company was a licensee of the Federal Power Commission the concern was thereby converted into a government agency or instrumentality, and that the property owned and utilized by it in exercising the authority delegated to it was immune from taxation since this property was the means by which the company in part was largely dependent for the exercise of the rights and powers conferred upon or delegated to it as a licensee of the Federal Power Commission.

In passing on the point this Honorable Court said:

> "Assuming, for present purposes that the licensee of the Power Commission is a Federal instrumentality immune from taxation or other direct interference by the State, it does not follow that the property appellant uses in its power project is clothed with that immunity. The exemption of an instrumentality of one government from taxation by the other must be given such a practical construction as will not unduly impair the taxing powers of the one or the appropriate exercise of its functions by the other." *Id. p. 294. Cf. Metcalf & Eddy v. Mitchell, supra.*

"With that end in view, the distinction has long been taken between a privilege or franchise granted by the government to a private corporation in order to effect some governmental purpose, and the property employed by the grantee in the exercise of the privilege, but for private business advantage. The distinction was pointed out by Chief Justice Marshall in McCulloch vs. Maryland, 4 Wheat. 316, and in Osborne vs. Bank, 9 Wheat. 738; see Union Pacific R. R. Co. vs. Peniston, 18 Wall. 5.

"It has been followed without departure and property so owned and used has uniformly been held to be subject to state taxation. Thompson vs. Union Pac. R. R. Co., 9 Wall. 579; Central Pac. R. R. Co. vs. California, 162 U. S. 91; Union Pac. R. R. Co. vs. Peniston, supra; Baltimore Shipbuilding & Dry Dock Company vs. Baltimore, 195 U. S. 375; Gromer vs. Standard Dredging Co., 224 U. S. 362; Ackerlind vs. U. S., 240 U. S. 531; Alward v. Johnson, 282 U. S. 509; Choctaw, O. G. R. R. Co. vs. Mackey, 256 U. S. 531; Group No. 1 Oil Corporation vs. Bass, 283 U. S. 279."

Without burdening the Court with a resumé of all of the decisions just hereinabove cited, we will select a few of the pertinent ones with the hope of showing their analogy to the case at bar.

In *Alward v. Johnson, supra*, it was held that property used in the operation of an automotive stage line was not exempt from State taxation because it was used in connection with the transportation of mails. Its applicability to the case at bar is obvious. This Court said:

"There was no tax upon the contract for such carriage (of mails); the burden laid upon the property employed affected operations of the government only remotely." *Id.*

In the case at bar there is not even inferentially a tax upon appellant corporation's contracts with the Government, because appellant admits that the taxes in controversy were not passed on to the Government by it at the time the contracts were entered into; but, in view of the enunciation of this Court in *Alward v. Johnson, supra*, just hereinabove quoted, the burden laid upon appellant corporation's property, that is to say its gasoline, if burden there be, could only affect the operations of the Federal Government remotely, if by any chance it may be construed that the "burden" complained of in the case at bar does reach the Government.

In *Gromer v. Standard Dredging Company, supra*, the proposition was involved of the right of the Insular government of Porto Rico to tax the use of machinery and boats in the harbor of San Juan in the performance of a dredging contract with the United States Government. The point was made by the dredging company that as an agency or instrumentality of the Federal Government the use of the dredging machinery and boats in dredging operations in the harbor of San Juan was absolutely essential to the carrying out of its contract with the Government, and that to tax the use of this machinery and these boats was to impose a tax upon an instrument of the National Government.

This Court held that such a contention could not prevail, citing *Baltimore Shipbuilding Company v. Baltimore, 195 U. S. 375.*

In *Thompson v. Union Pacific Railroad Company*, *supra*, this Court, in the body of its decision, said.

> "No one questions that the power to tax all property, business and persons within their respective limits, is original in the States and has never been surrendered. It can not be so used, indeed, as to defeat or hinder the operations of the National Government; but it will be safe to conclude, in general, in reference to persons and State corporations employed in government service, that when Congress has not interposed to protect their property from State taxation, such taxation is not obnoxious to that objection.
>
> "We perceive no limits to the principle of exemption which the complainants seek to establish. It would remove from the reach of State taxation all the property of every agent of the government. Every corporation engaged in the transportation of mails or of government property of any description by land or water, or in supplying materials for the use of the government, or in *performing any service of whatever kind*, might claim the exemption." *Id.* (Italics ours.)

Our conception of a governmental agency or instrumentality such as is entitled to plead exemption or immunity from taxation, is primarily an agent or instrument created by Congress, and designed for the execution of some governmental or quasi-governmental function. Or, such an agent or instrument as is so closely connected with the Government as to be inseparable from it, and whose functions are confined to the carrying out of particularly delegated duties partaking of the sovereign nature of the Government. Its existence must be so closely allied with the Government, and its association so intimate as to easily

permit the identification of the agent or instrument either as an integral part of the Government itself, or as occupying a relationship closely akin thereto.

There must either be a modified grant of sovereignty, so to speak, by Congress to the instrument or agency, or the relationship to the Government must be so close as to make the agent or instrument a direct servant of the Government and entirely amenable to its will and dictation in all respects. It must be bound in some degree at least to the duties of a servant with little or no independence of action, and so completely under the domination of the Government as to be subservient to its will in all matters relating to the particular work or functions it it called upon to carry out or exercise.

We cannot conceive of an independent contractor assuming the role of an agency or instrumentality of the Government, certainly not to the extent that it may properly claim immunity and exemption from taxation on that score.

The evidence before this Honorable Court in the form of precise facts judicially admitted conclusively establishes that appellant corporation, in its aforesaid relations with the United States Government, is an independent contractor and in no legal sense an agency or instrumentality of the Government; and if it should appear that appellant is an independent contractor its claim that it is an agency or instrumentality of the Government is not simply negatived but absolutely refuted, and its alleged

immunity from taxation as such governmental agency or instrumentality becomes a mere myth.

In Paragraphs 1, 2, 3 and 4 of the Admissions, *(R. 23)*, and in Paragraphs 14, 16 and 17 of the Admissions, *(R. 25)*, the independent nature of appellant corporation's business is admitted.

In Paragraph 5, *(R. 23, 24)*, and Paragraph 12, *(R. 24, 25)*, and Paragraphs 19, 20, 21 and 26 of the Admissions, *(R. 26, 27)*, the existence of contracts for the performance of a specified work, levee construction, is admitted; in Admissions, Paragraphs 20, 21 and 22, *(R. 26)*, the agreement to perform the work for a fixed price is admitted; in Paragraphs 23, 24, 25 and 26, *(R. 26, 27)*, the exclusive employment of labor and assistants by the appellant corporation, and appellant corporation's complete control over such labor and assistants is admitted; and in the Admissions, Paragraph 23, *(R. 26)*, and Paragraph 7, *(R. 24)*, and Paragraphs 24, 25 and 26, *(R. 26, 27)*, the right to control the work contracted for while in progress, *except as to results*, is admittedly reserved to appellant corporation.

There is no question then of the fact that the relation existing between appellant corporation and the Federal Government is that of contractor and contractee, and not that of employer and employee, or master and servant.

This Honorable Court has often recognized the distinction between agents, servants or instrumentalities of the Government and that of independent contractors, and in

Casement v. Brown, 148 U. S. 615, in discussing the contention of defendants that they were not independent contractors but employees of certain railroads for which they were constructing a particular work, this Court said:

> "With reference to the first contention (that of not being independent contractors) obviously the defendants were independent contractors. The plans and specifications were prepared and settled by the railroad company; the size, form and place of piers were determined by them, and the defendants contracted to build piers of the prescribed form and size at the places fixed. They selected their own servants and employees. Their contract was to produce a specified result. They were to furnish all the materials and do all the work, and by the use of that material and the means of that work were to produce the complete structures. The will of the company was represented only in the result of the work, and not in the means by which it was accomplished. This gave to the defendants the status of independent contractors, and that status was not affected by the fact that, instead of waiting until the close of the work for acceptance by the engineers of the company, the contract provided for their daily supervision and approval of both material and work. The contract was not to do such work as the engineers should direct, but to furnish suitable material and construct certain specified and described piers, subject to the daily approval of the company's engineers. This constant right of supervision, and the continuing duty to satisfy the judgment of the engineers, do not alter the fact that it was a contract to do a particular work and in accordance with plans and specifications already prepared. They did not agree to enter generally into the services of the company, and do whatsoever their employers called upon them to do, but they contracted for a specific work. The functions of the engineers were

> to see that they complied with the contract—only this, and nothing more! They were to see that the thing produced and the result obtained was such as the contract provided for." *Id. 13 S. Ct., p. 675.*

How manifest is it from this Court's outline of the status of an independent contractor that appellant corporation occupies this identical relation toward the Government of the United States in the performance of its present contracts therewith?

The plans and specifications for the levee construction work are prepared and settled by the Government; the size, form and place of the levees are determined by it; appellant corporation contracted to build levees of the prescribed form and size and at the place fixed in its contracts with the Government. Appellant corporation selects its own servants and employees; its contract is to produce a specified result; it is to furnish all the material and do all the work and by the use of that material and the means of that work, are to produce completely constructed levees. The will of the Government is represented only in the *result* of the work and not in the *means* by which it is accomplished.

Appellant's contract is not to do such work as the engineers of the Government should direct, but to furnish suitable material and construct certain specified levees, subject to the daily approval of the Government engineers. This constant right of supervision and the continuing duty to satisfy the judgment of the engineers do not alter the fact that it is a contract to do a particular work and in accordance with plans and specifications already prepared.

Appellant corporation did not agree to enter generally into the services of the Government and to do whatsoever the Government called upon it to do, but it contracted for a specific work—the construction of levees. The function of the Government's engineers is to see that appellant corporation complies with its contracts—"only this, and nothing more!" These engineers are to see that the thing produced, and the result obtained, are such as the contracts with the Government provide for.

Clearly, then, appellant corporation functions only in the capacity of an independent contractor in carrying out its aforesaid contracts, and bears no such relation to the Government in executing them as would entitle it to the classification of an agent or instrument of the Government, at least in the sense that it may claim the exemption and immunity from taxation which such agencies and instrumentalities ordinarily enjoy.

Appellant seems to rely strongly upon the case of *Helson v. State of Kentucky, 279 U. S. 245*, as supporting its contention that the tax upon the sale, use or consumption of gasoline in Louisiana falls directly upon the use of one of the means by which a Government contract is carried on, and therefore directly burdens that contract.

We need only point out that appellant's contracts with the Government are admittedly not burdened by the tax in question since the tax was not taken into consideration by the appellant at the time of the submission of its bids for the work it is now doing for the Government, but as a matter of fact there is little or no applicability of the *Helson* case to the case at bar.

The immunity from taxation of the gasoline used as the motive power of the ferry boat referred to in the *Helson* case is predicated upon a state of facts which clearly warranted this Honorable Court's ruling therein, but which ruling is peculiarly applicable only to cases which constitute a direct parallel as to the facts involved, and cannot possibly be stretched to cover a situation such as is presented by the facts of the instant case.

In the *Helson* case this Honorable Court affirmed what it had many times previously held, that the operation of a ferry boat across a border stream between States is interstate commerce. The Court was dealing with a tax sought to be laid upon the use of a commodity which had been already launched in what was undoubtedly interstate commerce, and which had not become disassociated from that commerce by attaining a situs in Kentucky.

The gasoline used to propel the ferry boat was purchased, and delivered to the boat, in Illinois, thereby being thus launched in interstate commerce, and deriving this character from the fact, as already stated, that the operation of a ferry boat between border States constitutes interstate commerce. The gasoline was not unloaded in the State of Kentucky, never became commingled with the mass of property in the State of Kentucky, and never attained a situs in that State. It remained where it began—in interstate commerce—and was thereby thoroughly immune from taxation by the State of Kentucky.

Had the State of Illinois, however, sought to tax the storage or use of this gasoline under a statute similar to the Louisiana laws there could have been no question as

to the right of that State to tax the commodity upon its withdrawal from storage therein, and before its advent into interstate commerce.

In the case at bar appellant does not cite any authority emanating from any competent source which would be even remotely persuasive of the conclusion that the construction of levees in Louisiana by it for the Federal Government constitutes interstate commerce, and unless it can bring this particular transaction within the category of interstate business or interstate commerce there is small solace it may obtain, in our humble estimation, from the *Helson* case.

In the instant case the State of Louisiana is claiming payment of excise taxes for the privilege of distributing, consuming and using a commodity in the State which not only has become disassociated from interstate commerce by reason of having attained a situs in Louisiana, but which could not possibly become again associated with commerce, either interstate or intrastate, until after the taxes claimed had accrued and become collectible. *Eastern Air Transport, Inc. v. South Carolina Tax Commission, 285 U. S. 147; Nashville Etc. R. R. v. Wallace, 288 U. S. 249; Gregg Dyeing Co. v. Query, 286 U. S. 472; Edleman v. Boeing Air Transport Inc., 289 U. S. 249.*

It is obvious that the appellant's main reliance is upon the *Gillespie* and *Panhandle* cases, *supra.* It is trying to maneuver itself into a position whereby it might invoke the protecting aegis of this Honorable Court's rulings in those cases, and while we do not concede their applicability to the case at bar, we believe it is a comparatively

easy matter to distinguish them from the case which is presently before this Honorable Court for determination.

In the *Panhandle* case the United States was the *direct purchaser* of the gasoline sought to be taxed. The commodity was intended for use by the Government in the operation of its Coast Guard Fleet in the Gulf of Mexico, and at its Veterans' Hospital, at Gulfport, Mississippi. This Honorable Court held that it is beyond the power of the States to lay a tax upon transactions by which the *United States secures* the things desired for its governmental purposes. And while this decision was rendered by a divided Court its thorough applicability to a Louisiana case identical in point of fact would be conceded by appellee since the Louisiana statutes particularly exempt from taxation sales of gasoline made to the United States Government.

However, appellant is not the United States Government, and while it tries to arrogate to itself the character of an agent or instrument of the Government it has failed so far as we can see to bring itself within that classification.

The *Gillespie* and cognate "Restricted Indian Land Cases" are *sui generis*, and have never been held by this Honorable Court to apply to any situation other than such as immediately parallels the facts presented therein.

As a matter of fact the *Gillespie* case is all but overruled by *Group Number 1 Oil Corporation v. Bass, 283 U. S. 279;* and in *Burnet v. Coronado Oil & Gas Company, 285*

U. S. 393, four members of this Honorable Court expressed the emphatic opinion that the *Gillespie* case should be overruled, advancing such cogent reasons therefor as to cause one to marvel that there should be further hesitation on the part of this Honorable Court to definitely depart from the doctrine enunciated in that case. As Mr. Justice Brandies, in his dissenting opinion in the *Burnet* case, *supra*, said, the *Gillespie* case "has served to render immune from State and Federal taxation vast private incomes", and that "to merely construe strictly its doctrine will not adequately protect the public revenues."

Appellant's Point No. 4.

Appellant contends that it is without adequate remedy at law *(Bill of Complaint, paragraph 20, R. p. 7)*, and this allegation is met by specific denial of appellee in paragraph 20 of her answer herein. *(R. p. 19)*.

The contention is predicated upon the alleged absence in the general law of Louisiana of proper provision for the recovery of taxes illegally collected or erroneously paid.

Regardless of whether this alleged deficiency exists in the general law of the State, special provision is made in the Louisiana gasoline taxing statutes for the refund by the Supervisor of Public Accounts of Louisiana of any such tax paid by the United States Government, or any of its agents or departments, upon proper showing and authentic proof thereof. (See Sec. 14, Act 6 of (E. S.) of 1928, as amended; Sec. 14, Act 1 (E. S.) 1930, quoted at page 3 of this brief, *supra*).

Appellant concedes that this remedy exists but insists that the purported immunity extends only to "a transaction not engaged in by appellant—a sale." That "any 'use' or 'consumption' of gasoline by the Government or in furtherance of a Government contract is left subject to the tax and the unwary taxpayer who parts with his money has lost it for all time." *(Appellant's brief, p. 28).*

We are sure counsel for appellant has inadvertently misstated the law. At *page 2* of Appellant's brief it correctly quotes in full Section 2, Act 6 (E. S.) of 1928, as amended, of which Section 2, Act 1 (E. S.) of 1930 is an exact counterpart, and this Section in unequivocal language denominates the importation of gasoline for *use* by the importer to be "the same as if it has been *sold* for domestic consumption." *(Last paragraph Sec. 2 Act 6 of 1928, Appellant's brief, p. 2).*

It is manifest from this quotation from the law that if one imports gasoline into Louisiana for his own use, this importation and use is deemed to be "the same as if it has been sold for domestic consumption", and if the Government, or any agency or department thereof, imports gasoline into the State for its or their own use, and has by any chance paid the tax thereon, a refund of the tax may be claimed of the Supervisor of Public Accounts of Louisiana the same as if the gasoline had been *sold* to the Government or an agency or department thereof, for domestic consumption.

As a matter of fact appellant has sought a refund of such taxes as it has actually paid, but the Supervisor of Public Accounts of Louisiana rejected the claim, not be-

cause "the purported immunity extends solely to a transaction not engaged in by appellant—a sale", but because the Supervisor could not conceive appellant to be the "United States Government, or an agency or department thereof", and appellant has never yet made to that office, or up to now to any Court, "proper showing" that it is entitled to claim that distinction.

The affidavits, unrefuted and irrefutable, of Justin C. Daspit, *(R. pp. 42, 43, 44)*, and of William A. Cooper, *(R. pp. 44, 45, 46)*, are conclusive that it is the policy of the Supervisor of Public Accounts to make proper refund of such taxes in cases where the refund is justified, and that she at all times has on hand ample funds for the purpose.

CONCLUSION.

We respectfully submit that appellant should have lodged its action in the law and not the equity side of the Court, but, without waiving this point, we likewise submit that appellant is entitled to no form of equitable relief.

We hold that appellant has utterly failed to establish that any burden has been placed upon its contracts with the United States to construct levees in Louisiana, particularly since it has judicially admitted that the alleged burden arising from the imposition of the taxes complained of does not reach the Government, nor its contracts with the Government, in view of appellant's failure to add the controverted taxes to the price of its bids for the work it is now doing for the Government.

That to absolve appellant from the payment of the taxes claimed would be to penalize the State of Louisiana for appellant's laches in not protecting its interest by computing every item of cost entering into the work it contracted for at the time of submitting its bids to the Government.

That the Government, under its *present* contracts with appellant, can derive no benefit or advantage from a remission to appellant of the controverted taxes since it is appellant's avowed purpose to pocket this saving and not pass it on to the Government.

That it is incumbent upon appellant to show that its *present* contracts with the Government are so burdened by the imposition of the taxes complained of as to hinder it from serving the Government thereunder as it was intended it should serve it, and this appellant has failed to do.

That it was incumbent upon appellant to show that the imposition of the taxes in contest actually serve to increase the cost of the work to the Government, and that this added cost tends to burden the Government in the exercise of its delegated powers, neither of which appellant has done nor can do since its *present* contracts with the Government admittedly do not purport to pass this extra cost on to the Government even if it may be conceded that such a "burden" would actually impede the Government in the exercise of its delegated powers.

That this Honorable Court is not concerned *in this action* with the possible *future* effect upon the Government,

or the possible effect upon its *future contracts* for public work, which the imposition of the controverted taxes may in the future have upon it or its contracts, but must determine solely whether the Government is *presently* affected, and whether its present contracts are burdened, and insofar only as the issue is presented in the *present* action.

And, finally, that appellant's transitory contractual relations with the Government cannot serve to transform it from an admittedly independent contractor into such an agency or instrumentality of the Government as may rightfully lay claim to the exemptions and immunities from taxation which are ordinarily accorded to such agencies and instrumentalities.

For these reasons we hold the judgment of the District Court should in all respects be affirmed.

Respectfully submitted,

GASTON L. PORTERIE,
Attorney General of Louisiana;

PEYTON R. SANDOZ,
Special Assistant Attorney General
of Louisiana;

JUSTIN C. DASPIT,
Special Assistant Attorney General
of Louisiana;

Counsel for Appellee.